No. 223

In the Supreme Court of the United States

OCTOBER TERM, 1967

DAVID PAUL O'BRIEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

Petitioner was convicted of violating the 1965 amendment to 50 U.S.C. App. 462(b)(3) making it a crime to knowingly mutilate or destroy a selective service certificate. On appeal, the Court of Appeals for the First Circuit held that the amendment was unconstitutional. The government has filed a petition to review that ruling (No. 232, this Term) on the ground that it is in conflict with the decision of two other circuits on the same question.

Despite its ruling on the unconstitutionality of the statute, the First Circuit affirmed petitioner's conviction (although vacating the sentence and remanding for resentencing), finding that the evidence clearly established that petitioner had wilfully violated a Selective Service regulation (32 C.F.R. 1617.1) which requires Selective Service registrants to keep their Registration Certificates in their "personal possession at all times". Wilful violation of the regulation is punishable to the same extent as a violation of Section 462(b)(3). See 50 U.S.C. App. 462(b)(6).

The cross-petition challenges the court of appeals' action in affirming the conviction. If this Court agrees with the government that the 1965 amendment under which petitioner was indicted is a valid exercise of congressional power, there will be no occasion to consider the soundness of the court of appeals' affirmance of the conviction on another ground. Should this Court disagree with us on the constitutional question, however, a substantial question would be presented as to whether the conviction may be affirmed. We therefore do not oppose the granting of the cross-petition together with the petition, and the consolidation of the cases for briefing and argument.

In affirming petitioner's conviction, the court of appeals relied on the doctrine of lesser included offenses. However, under this Court's rulings, a "defendant may be found guilty of an offense necessarily included in the offense charged" (F.R. Crim. P. 31(c)) only if the charged offense is a greater crime and the conduct which establishes the included offense is an element of the charged offense. *E.g.*, *Sansone* v. *United*

States, 380 U.S. 343; *Berra* v. *United States*, 351 U.S. 131. It is doubtful that either condition is satisfied here, since wilful nonpossession of a draft card carries the identical punishment as wilful destruction or mutilation, and since nonpossession—as we have argued in our petition in No. 232—is not a necessary element of the crime of destruction or mutilation.

Perhaps, the result reached below may be sustained on the theory that an indictment is deemed to charge all the crimes that its factual allegations fairly comprehend. "In order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purported to lay the charge is immaterial. He may have conceived the charge under one statute which would not sustain the indictment but it may nevertheless come within the terms of another statute. See *Williams* v. *United States*, 168 U.S. 382." *United States* v. *Hutcheson*, 312 U.S. 219, 229. Since the indictment charged a destruction of petitioner's draft card by burning, it comprehended nonpossession as well, since nonpossession would be a necessary consequence of destruction. On the other hand, it is arguable that the principle of *Williams* and *Hutcheson* should be limited to cases involving a challenge to the indictment as failing to charge any offense, in light of the Court's later decision in *Cole* v. *Arkansas*, 333 U.S. 196. There, it was held a violation of due process to convict on a charge not specified in the indictment, albeit guilt of that charge was necessarily

established by the jury's verdict finding the defendants guilty of the charge in the indictment.

We do not suggest at this juncture a definitive resolution to this difficult question. Since it cannot be deemed insubstantial and since it will be inescapably presented if this Court should reject the government's position in No. 233, we believe that it would be appropriate for the Court to grant the cross-petition and consolidate the cases for briefing and argument.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

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